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1 BEFORE THE CITY OF CHICAGO POLICE BOARD
2 IN THE MATTER OF:)
3 CHARGES AGAINST)
4 SGT. DUANE A. BENNETT,) No. 13 PB 2827
5 Respondent.)
6
7 30 North LaSalle Street
8 Suite 1220
Chicago, Illinois 60602
9
10 July 11, 2013
11 2:00 o'clock p.m.
12
13 PRESENT: Ms. Jacqueline A. Walker, Hearing Officer
14 Mr. Max Caproni, Executive Director
15 Mr. Patrick Polk,
Assistant Corporation Counsel,
16 on behalf of the Superintendent;
17
18 Mr. Daniel Herbert,
19 on behalf of the Respondent.
20
21 REPORTED BY: DANIEL M. PRISCU, CSR
License No. 084-003982
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23
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1 HEARING OFFICER WALKER: The first matter
2 before the Police Board is that of Sergeant Duane A.
3 Bennett, Case Number 13-2827.
4 MR. POLK: Patrick Polk for the
5 Superintendent.
6 MR. HERBERT: Dan Herbert for the
7 Respondent, Duane Bennett, who is also present.
8 HEARING OFFICER WALKER: This is a
9 continued hearing in this matter.
10 I believe we left off in the Respondent's
11 case, so, Mr. Herbert?
12 MR. HERBERT: We did. Thank you,
13 Ms. Hearing Officer.
14 At this point, the parties have reached a
15 stipulation regarding the admission of a negative
16 drug test with a hair sample, and at this point I'd
17 like to mark it as an exhibit and enter it into
18 evidence, unless you prefer if I read it into the
19 record.
20 HEARING OFFICER WALKER: Well, so it would
21 be a joint exhibit?
22 MR. HERBERT: Yes, we can make it a joint
23 exhibit.
24 HEARING OFFICER WALKER: So we already

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1 I N D E X
2 SHIRLEY A. CONIBEAR, M.D.
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6
7 E X H I B I T S
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9 Joint Exhibit No. 2 182
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1 have one joint exhibit, so this would be Joint
2 Exhibit 2.
3 (WHEREUPON, Joint Exhibit No. 2
4 was marked for identification.)
5 MR. HERBERT: And I've already tendered
6 counsel a copy of the signed stipulation.
7 HEARING OFFICER WALKER: And, Mr. Herbert,
8 I see your signature.
9 MR. HERBERT: Yes. It's signed by both
10 parties.
11 HEARING OFFICER WALKER: Mr. Polk?
12 MR. POLK: Yes.
13 HEARING OFFICER WALKER: Fine.
14 MR. HERBERT: At this point, the
15 Respondent will rest.
16 HEARING OFFICER WALKER: Rebuttal on the
17 part of the Department?
18 MR. POLK: We call Dr. Shirley Conibear.
19 (Witness sworn.)
20 SHIRLEY A. CONIBEAR, M.D.,
21 called as a witness herein, having first been duly
22 sworn, was examined and testified as follows:
23
24

1 labeled Superintendent's Exhibit No. 6.

2 What's this document?

3 **A It's a copy of my curriculum vitae.**

4 **Q** Is this a true and accurate copy of your
5 CV?

6 **A It is.**

7 **MR. POLK:** I move to have Superintendent
8 Exhibit No. 6 entered into evidence and have
9 Dr. Conibear accepted as an expert Medical Review
10 Officer who interprets hair and urine drug tests.

11 **MR. HERBERT:** No objection.

12 **HEARING OFFICER WALKER:** Okay. Fine. It
13 shall be admitted.

14 **BY MR. POLK:**

15 **Q** In working at The OMS, how do Chicago
16 Police Department drug cases get referred to you?

17 **A It depends on whether or not they're
18 hiring. I probably do somewhere less than 50 a
19 year, I would say.**

20 **Q** Did you do any work involving the dug test
21 results of Sergeant Duane Bennett?

22 **A Yes, I did.**

23 **Q** How did you become involved with that
24 case?

1 **test for marijuana.**

2 **Q** And did you consider the list of
3 medications that he provided?

4 **A I did.**

5 **Q** And what conclusions did you draw
6 regarding Sergeant Bennett's medications?

7 **A That none of them would account for the
8 positive.**

9 **Q** In preparing to testify for this hearing
10 today, did you review any additional materials?

11 **A Yes, I did.**

12 **Q** What did you review?

13 **A I reviewed testimony by Dr. O'Donnell, and
14 I reviewed a report that he authored expressing his
15 opinions. And I reviewed a paper which he
16 referenced in his report, and I reviewed some other
17 literature.**

18 **Q** I'm showing you what's previously been
19 labeled as Superintendent's Exhibit No. 4.

20 **Is this a copy of the report that you
21 reviewed in preparing to testify today?**

22 **A It is.**

23 **Q** His report contains four observations and
24 opinions, correct?

1 **A I got a letter from Sergeant Hermann of
2 Special Affairs.**

3 **Q** What did you review when you started
4 working on this case?

5 **A I reviewed her letter, which contained an
6 interview with the donor. It contained results of
7 the urine drug screen. There was a list of drugs,
8 prescription drugs, and over the counter medication.**

9 **There was a copy of the agreement between
10 the union and the Chicago Police Department in
11 regard to drug screening. And there was a consent
12 to release medical information from the donor.**

13 **Q** In the interview you had a copy of, did
14 Sergeant Bennett provide a list of environmental
15 exposures that he had encountered?

16 **A Yes.**

17 **Q** Did you consider those different
18 environmental exposures that he listed when you
19 looked at the case?

20 **A Yes, I did.**

21 **Q** What conclusions did you draw on those
22 environmental exposures?

23 **A In my opinion, they would not account for
24 the results of the urine drug screen, the positive**

1 **A Yes.**

2 **Q** Have you formed an opinion about each of
3 Dr. O'Donnell's observations and opinions?

4 **A Yes.**

5 **Q** Turning to the second page of this report,
6 could you please read Dr. O'Donnell's first opinion
7 and observation.

8 **A "There is no question that exposure to an
9 environment with secondhand smoke of burned
10 marijuana (THC) is absorbed and deposited in the
11 body, and tests for marijuana metabolites are
12 positive.**

13 **This has been reported in the literature
14 for the last several decades - a reprint of a 1986
15 article on the topic (Journal of Clinical
16 Pharmacology) is appended to this report."**

17 **Q** What is your opinion about this first
18 portion of the report?

19 **A Well, I would agree that it doesn't matter
20 whether it's secondhand smoke or smoke that's
21 inhaled directly from a marijuana cigarette.**

22 **They both can be absorbed through the
23 lungs and be deposited in the body and metabolite
24 then show up in the urine.**

1 Q What are the guidelines for a positive
2 marijuana urine test that the Chicago Police
3 Department uses?

4 A They use the SAMHSA cutoffs, 15 nanograms
5 for the screening, and 15 nanograms for the GC/MS
6 confirmation.

7 Q How are those SAMHSA guidelines chosen?

8 A SAMHSA considered the medical literature
9 and heard testimony from a lot of people, and their
10 scientists came to the decision that these were the
11 most reasonable cutoffs to use.

12 Q Are you familiar with the literature that
13 Dr. O'Donnell cited in his opinion?

14 A Yes, I am.

15 Q I'm showing you what has previously been
16 labeled as Superintendent's Exhibit No. 3.

17 Is this the article that Dr. O'Donnell
18 cited to?

19 A I believe it is.

20 Q Does this article support his conclusion?

21 A Well, it supports the first sentence that
22 secondhand smoke of burned marijuana can be absorbed
23 in the body and metabolites that appear in the
24 urine, yes.

1 A Yes, I am.

2 (WHEREUPON, Superintendent
3 Exhibit No. 7 was marked for
4 identification.)

5 BY MR. POLK:

6 Q I'm showing you what's been labeled as
7 Superintendent's Exhibit No. 7.

8 What is this document?

9 A This is a second article written by
10 Dr. Cone and Rolley Johnson dealing with the same
11 experiment published about six months later.

12 Q Did you review this article in preparing
13 to testify today?

14 A I did.

15 Q Could you briefly summarize the results
16 that are described in this article?

17 A This article provides information about
18 the measurement of the carbon monoxide and the
19 marijuana, the THC in the room air during the
20 experiment, and it also provides a record of the
21 urine drug screen analysis of each of the subjects
22 throughout the eight day period that they were
23 tested.

24 Q Did this second article use the same

1 Q What were the testing conditions in the
2 article Dr. O'Donnell cited in his opinion?

3 A I'm sorry. Can you repeat the first part?

4 Q What were the testing conditions?

5 A They confined a group of people to a small
6 room. There was no ventilation. And then they used
7 a smoking machine to inject sidestream smoke, all
8 the sidestream smoke from the smoking of marijuana
9 cigarettes into the room. They held the people in
10 the room for an hour every day.

11 Q How many days did they perform that test?

12 A I believe this went on for eight days.

13 Q Were the test subjects able to tolerate
14 the test conditions?

15 A They found the lower exposure with four
16 smoked marijuana cigarettes to be tolerable, but
17 when the 16th cigarette exposure occurred, many of
18 them had to wear goggles because they found the
19 smoke to be so thick and irritating to their eye.

20 Q Was smoke visible in the testing room?

21 A Yes, it was.

22 Q Are you aware of any subsequent articles
23 written by the same Dr. Cone, who authored this
24 article?

1 experimental design as the first article by
2 Dr. Cone?

3 A It is the same experiment. It's just
4 another paper.

5 Q Were there GC/MS results in the follow-up
6 article?

7 A Yes.

8 Q What were the GC/MS results of the
9 experimental condition when four marijuana
10 cigarettes were burning in the six by seven by eight
11 room for one hour for one day?

12 A That's contained on page 94 of the paper
13 in the first column, and the subject GC/MS assay of
14 their urine was 0 to 6 ng/ml.

15 Q So was 6 ng/ml the maximum result that was
16 achieved?

17 A Yes.

18 Q Could you please turn back to
19 Superintendent's Exhibit No. 4 and read
20 Dr. O'Donnell's second observation and opinion?

21 A "The 33 ng confirmation level of the Quest
22 Urine test is an extremely small amount of
23 marijuana. It represents very distant use or
24 minimal proximal use. Interesting, the confirmation

1 test is only performed if the screening test is
2 exceeded. That is, a screening test threshold of
3 50 ng/ml should report a negative if less than
4 50 ng/ml is present. In most drug testing
5 scenarios, this would be reported as a negative."

6 Q What is your opinion about this portion of
7 the report?

8 A Well, I don't agree that 33 nanograms is
9 unusually small. In my experience about 50 percent
10 of the marijuana positive tests that I see are under
11 100, and most of them are under 50. And so I don't
12 know exactly what he means by extremely small.

13 And, secondly, I think what he is trying
14 to say here is that because the threshold test was
15 over 50, then he would have expected the GC/MS to be
16 over 50 nanograms, which is not correct, because the
17 screen measures is the different method, and it
18 measures multiple metabolites, whereas the GC/MS
19 only measures one metabolite.

20 Q Are the results of the initial test and
21 the confirmation test consistent?

22 A No.

23 Q Are they consistent?

24 A Yes.

1 A It's a publication from the Journal of
2 Natural Products, 1996. It's entitled "The Volatile
3 Oil Composition of Fresh and Air-Dried Buds of
4 Cannabis sativa."

5 Q Did you review this article in preparing
6 to testify today?

7 A I did.

8 Q And what does this article say?

9 A This article is a measurement of the
10 unburned -- the odor coming from unburned marijuana
11 plants on, both, dried and undried, and Table 2 of
12 all of the chemicals that were measured by GC/MS.

13 Q And what were the results of the list of
14 chemicals?

15 A There's no THC in here.

16 Q So does that mean there's no THC in the
17 odor of unburned marijuana?

18 A Yes.

19 Q Now, also in this third opinion of
20 Dr. O'Donnell's, he referenced the other exposures
21 that Sergeant Bennett had.

22 In your opinion, how did the environmental
23 exposures that Sergeant Bennett described in his
24 interview with Internal Affairs compare to the

1 Q Please read the third Observation and
2 Opinion that Dr. O'Donnell provided.

3 A "The environmental exposures -- smoke/THC
4 use in the home, concert/theater, shop all have the
5 potential for absorption. The odor of THC in the
6 District Station is a result of volatilization of
7 the plant materials - if the odor can be detected,
8 the subject is exposed. THC and its metabolites can
9 be absorbed, and the THC metabolite can be detected
10 on precision testing."

11 Q What is your opinion about this portion of
12 the report?

13 A I don't agree that the odor of unburned
14 marijuana contains any THC.

15 Q And why don't you agree?

16 A Well, there's been an analysis of the odor
17 of marijuana published in the literature, and it
18 does not contain any THC. And there have been
19 studies done on the conversion of the
20 non-volatilized oils in the plant via the process of
21 burning.

22 Q I'm showing you what's previously been
23 labeled as Superintendent's Exhibit No. 8.

24 What is this documented?

1 experiments you read about in the medical
2 literature?

3 A Can you say that again?

4 Q In your opinion, how do the environmental
5 exposures that Sergeant Bennett described in his
6 interview with Internal Affairs compare to the
7 experiments you read about in the medical
8 literature?

9 A The room where the exposure occurred was
10 larger. The time spent in the room was less than an
11 hour. The number of smokers was three. And at some
12 point the door to the room was opened.

13 Q Please read the fourth and final
14 observation from Dr. O'Donnell's report.

15 A "The Adult Primary Care Center sample
16 collection several days after the CPD sample proved
17 negative."

18 Q What is your opinion about this portion of
19 the report?

20 A Well, I agree that the report says that
21 it's negative, but I don't agree that that has
22 anything to do with the positivity that was found in
23 the July 10th CPD test.

24 Q Why not?

1 A Well, for one thing, and probably the
2 biggest thing, is that it was too long after.
3 It was at least six days later, which
4 would be -- compounds in the body have what's called
5 a half life, and it takes a certain period of time
6 for half of the material to be excreted.

7 And this would be a half life of about
8 four times. Since he had a 33, the first half life
9 would have occurred at 36 hours, and it would have
10 been down to 17. And then 36 more hours after that,
11 it would have been well below 15. So it's well
12 outside of the expected excretion time. It would
13 have been expected to be below 15.

14 Secondly, the sample given to me had no
15 validity testing, so there was no specific gravity.
16 There's no information about the temperature of the
17 specimen.

18 There's no test for adulterating
19 substances, oxidation, no creatinine nor specific
20 gravity, which will tell you about dilution. And
21 there's nothing about what the cutoffs were.

22 Q Just to clarify, and when you're talking
23 about this test, are you referring to the second
24 urine test that was performed?

1 opinion about whether Sergeant Bennett's positive
2 marijuana drug test was the result of environmental
3 factors?

4 A No.

5 Q Why not?

6 A Well, it was quite a long time after the
7 exposure. It was 42 days from the original CPD
8 urine test. And hair has a different timing.
9 You're looking back over a three month average.

10 So a person can have one exposure, use it
11 once, and be positive, a urine screen positive, but
12 not have their hair be positive.

13 Q In your opinion, are hair drug tests more
14 accurate than urine drug tests?

15 A No. I would just say that they're
16 different.

17 Q How so?

18 A Well, they tend to catch different kinds
19 of use.

20 A urine drug screen will catch someone who
21 has used within two to three days of the test, and a
22 hair drug screen will catch someone who has used on
23 a fairly regular basis over about a three month time
24 period.

1 A Yes. And that's what you meant?

2 Q Yes. You said that when you talked about
3 the materials you reviewed, in addition to the urine
4 test that he took on July 16th, you also reviewed
5 the results of the hair sample drug test that
6 Sergeant Bennett had performed on August 21, 2012,
7 correct?

8 A Correct.

9 Q And what were the results of that test?

10 A It was negative.

11 Q In your opinion, was Sergeant Bennett's
12 positive drug test due to the environmental factors
13 he listed?

14 A No.

15 Q Why not?

16 A Because the exposures that he described
17 were either too long prior to the time of the urine
18 drug screen, or they were not of sufficient
19 intensity to account for the amount that was found
20 in his urine.

21 Q Is your opinion to a reasonable degree of
22 medical certainty?

23 A Yes, it is.

24 Q Does the hair drug test result change your

1 MR. POLK: Thank you. Nothing further.

2 HEARING OFFICER WALKER: Cross-examination?
3 CROSS-EXAMINATION

4 BY MR. HERBERT:

5 Q Good afternoon, Doctor. How are you?

6 A Good.

7 Q You indicated that you worked for OMS; is
8 that correct?

9 A Yes.

10 Q And is it fair to say that for OMS you are
11 a MRO, correct, a Medical Review Officer?

12 A Yes.

13 Q And you indicated, I believe, on direct
14 that you've testified as an expert over 100 times?

15 A Yes, including Worker's Comp cases.

16 Q And you talked about that you take cases
17 for either side, correct?

18 A Correct.

19 Q When you say "either side," it's the
20 employer and the employee?

21 A Generally, that's the way things go. It's
22 usually employer, employee.

23 Q What percentage of cases in which you
24 testified on behalf of were for the employers?

1 A Well, that's hard to say, because it
2 depends on what my opinion is.
3 I do independent medical evaluations, so
4 my opinion may be favorable to one side or the
5 other, so it depends on the case.
6 Q What percentage of the cases that you
7 testified in were more favorable for the employer?
8 A It's hard to say by a number of cases. By
9 revenue it's probably about equal.
10 Q My question, though, is what percentage of
11 cases have you testified in which the evidence has
12 been more favorable to the employer versus the
13 employee, not the dollar amount, just the percentage
14 of cases in which your testimony was more favorable
15 to the employer?
16 A Well, that's a different question.
17 Q Actually, it's the same question.
18 A I don't know. It's probably about maybe
19 30/70 in favor of the employer.
20 Q So 70 in favor of the employer?
21 A Yes.
22 Q And the City of Chicago is a client of
23 yours, correct?
24 A Not of The OMS, no.

1 a positive drug screen, so that was my opinion.
2 Q That there was a positive drug screen?
3 A Right.
4 Q So would it be fair to say, then, all five
5 of the cases in you've testified before this Board
6 that the evidence that you provided for testimony
7 was more favorable to the employer?
8 A Yes. I guess you would call it favorable.
9 There was a positive drug screen.
10 Q And in what other forums have you
11 testified on behalf of your client, the Chicago
12 Police Department, other than the five times at the
13 Police Board?
14 A That's all.
15 Q How many times have you rendered opinions
16 for your client, the Chicago Police Department, in
17 drug test cases?
18 A Well, like I testified, I probably get
19 about 50 a year.
20 Q And how many years has the Chicago Police
21 Department been your client?
22 A About five.
23 Q So is it fair to say that you've done
24 approximately 250?

1 Q You indicated, I believe, on direct that
2 you had provided testimony for the City of Chicago
3 in the past?
4 A The Chicago Police Department.
5 Q So the Chicago Police Department is a
6 client of your company's?
7 A Yes.
8 Q And what percentage of cases in which you
9 have worked on for the Chicago Police Department
10 provided favorable testimony for the employer?
11 A Well, I think I've been here about five
12 times. Once I was called by the plaintiff -- the
13 defendant, but my testimony wasn't favorable. And I
14 don't really know what happens to people, so I don't
15 think any cases that I decide are negative.
16 I don't think there's anything that
17 happens as a result of those, so the only time I
18 come here is if they're positive.
19 Q And how many times have you come here if
20 they're positive for the Chicago Police Department?
21 A I think about five.
22 Q And in those five cases, what opinions did
23 you render?
24 A Well, I come here because I think there's

1 A Yes.
2 Q And what percentage of those 250 cases did
3 you find that the drug test was positive?
4 A Well, I only see positives.
5 Q I guess I'll ask another question, then.
6 In all 250 of those cases, there was an
7 indication of a positive test; is that correct?
8 A Yes. I don't get them otherwise.
9 Q Were you asked to render opinions as to
10 whether or not the results could have been false
11 positives in those cases?
12 A Generally, they present me with a list of
13 medications and over the counter and any other
14 relevant facts. And then they ask me if those
15 things could have accounted for the positive drug
16 screen.
17 Q And as we sit here today, can you tell me
18 how many cases you have opined that there could be a
19 false positive with the test?
20 A Well, "false positive" is not a word that
21 describes what I do.
22 Q I'll ask a different question.
23 How many times out of these approximately
24 250 cases have you determined that the positive drug

1 test was not from intentional exposure to the drug
2 in which the test was positive for?
3 **A I think, if you'll allow me, what I find**
4 sometimes is that there is a medical explanation for
5 the positive, and that's my report. It doesn't make
6 it into a negative. It says that these things,
7 taken legitimately, could account for the positive.

8 Q I understand that, but I'm really trying
9 to get specifically out of these approximately 250
10 cases, how many times have you determined that the
11 positive result was not a result of an intentional
12 exposure to the drug in which you tested positive
13 for?

14 **A Well, I would say it's well more than**
15 **half.**

16 Q Well more than half the time you have
17 determined that the positive result was not from
18 exposure or intentional exposure to the drug?

19 **A Yes. Well, not from illicit exposure to**
20 **the drug; intentional they took it, it was**
21 **prescribed for them.**

22 Q And you wouldn't characterize that as a
23 false positive?

24 **A No.**

1 factors other than taking a legally prescribed drug?
2 **A For the most part, it's taking a legally**
3 **prescribed drug.**

4 Q Do you remember of any cases in which it
5 was something different than that?

6 **A Well, there are what we call invalid drug**
7 **screens which deal with --**

8 Q And I'm asking specific, though, not
9 generally speaking, but with the cases that you
10 talked about where you rendered opinions that there
11 was a medical explanation for the positive result,
12 in any of those cases, can you cite to any cases
13 other than somebody taking a legally prescribed
14 drug?

15 **A Sometimes over the counter drugs can be a**
16 **reason.**

17 Q Do you know of any cases in which you
18 found that there was a use of over the counter drugs
19 that caused this positive test?

20 **A Yes, I can think of cases like that.**

21 Q So it's fair to say that over the counter
22 drugs could certainly result in positive results for
23 a particular narcotic, correct?

24 **A For some particular drugs, yes.**

1 Q But you would agree that the result --
2 that in those over 50 percent of the cases that the
3 result was not from intentional absorption by the
4 person?

5 **A Well, it was. They were taking it by**
6 **prescription.**

7 Q Okay. So is it fair to say, then -- I
8 guess I'm trying to just clarify in my mind -- is it
9 fair to say that you determined that there was
10 nothing improper about the consumption of the drug
11 that led to the positive result in over 50 percent
12 of the cases?

13 **A Well, I wouldn't use the word "improper"**
14 **for what I do.**

15 **What I do is I confirm that there's**
16 **legitimate medical use, a prescription has been**
17 **written, the person has filled it, and they're**
18 **taking it, and that is what's being detected in the**
19 **urine.**

20 Q I mean, if it's over 50 percent, so we're
21 talking over 125 of these cases, in each of these
22 cases has it been your opinion that it was the use
23 of a legally prescribed drug that caused the reading
24 which came to issue to you, or were there other

1 Q And marijuana would certainly be one of
2 those drugs, correct?

3 **A Not in Illinois yet.**

4 Q It's your testimony that you are not aware
5 of any over the counter drug that would cause a
6 positive reading for marijuana?

7 **A Not on GC/MS.**

8 Q Are you aware of any over the counter drug
9 that would cause a positive reading for marijuana in
10 any type of drug test?

11 **A Well, some of the screeners can be fooled**
12 **by certain medications.**

13 Q And that would cause a positive for a
14 test, correct?

15 **A A positive screen, yes.**

16 Q And that would be because they were
17 fooled, the screeners were fooled?

18 **A The screeners can have cross re-activity.**

19 Q And you prepared a report in this case,
20 correct?

21 **A Pardon?**

22 Q You prepared a report in this case,
23 correct?

24 **A Yes, I did.**

1 Q And, obviously, you're here testifying
2 today correct?

3 A Correct.

4 Q And you were here on a previous day
5 testifying, correct?

6 A Yes.

7 Q And are you being paid for your work on
8 this case?

9 A Yes, I am.

10 Q And you're being paid by the City of
11 Chicago.

12 A Well, the Chicago Police Department.

13 Q How much are you being paid? How much
14 have you been paid, and what do you expect to make
15 in this case?

16 A I was paid \$200 for the urine drug screen
17 report. And I don't know what I have billed so far.
18 I was here for quite a few hours the other day. And
19 I put in a couple hours of prep for this. And
20 depending on how long I'm here, it's probably going
21 to be something like 12 hours, and my rates are
22 about 550 an hour.

23 Q Is that a flat rate, 550 an hour,
24 depending on whether you do work, preparing a report

1 Q And as far as you prepared a report in
2 this case, as you've already testified to, and the
3 information that you reviewed prior to preparing
4 that report, you said that you reviewed some
5 documents you received from Sergeant Hermann from
6 the Internal Affairs Division, correct?

7 A Correct.

8 Q And you also talked about how you reviewed
9 the results of the drug screen, correct?

10 A Yes.

11 Q And would that have been the drug screen
12 that was done by the Chicago Police Department?

13 A I looked at all three.

14 Q And when you say "all three," you mean
15 also the negative urine sample that was
16 independently done by my client, correct?

17 A Yes.

18 Q By the same agency that conducted the test
19 for the Chicago Police Department, correct, Quest
20 Technologies?

21 A Well, it's sort of unclear to me.

22 Q You would agree that Quest conducted the
23 test for the Chicago Police Department's urinalysis,
24 correct?

1 versus testimony?

2 A No. That's for testimony.

3 Q You talked earlier about the Department of
4 Transportation as being one of the, I guess,
5 governing bodies for your practice for interpreting
6 drug test results?

7 A Yes. DOT has regulations, and most people
8 tend to follow those in lieu of making their own.

9 Q How about the Department of Human Health
10 Services, the Illinois Department of Human Health
11 Services, are there regulations in which you follow
12 based upon the Department of Human Health?

13 A I don't do any drug testing for them.

14 There are other entities that have their own rules
15 and regulations.

16 Primarily, I deal with DOT or, actually,
17 primarily now I deal with non-DOT situations.

18 Q But is it fair to say that you follow the
19 standards of the federal regulation when providing
20 medical opinions?

21 A Well, the training for MRO is all about
22 DOT because it's mandated so that's the foundation.
23 Individual employers may or may not deviate from
24 that in various ways.

1 A Yes, Quest conducted the test.

2 Q And when you reviewed the urine results,
3 which had a negative result, that was conducted by
4 Quest, correct?

5 A Well, one page says it was, and the other
6 page said it wasn't, so I'm not quite clear.

7 Q Did you see any other company that tested
8 that urine other than Quest?

9 A Well, there's a list of companies, I think
10 they're all owned by Quest, on the second page, but
11 I'm not clear on that.

12 Q So would it be fair to say that Quest
13 conducted that test then?

14 A I don't know.

15 Q And then you also reviewed the negative
16 hair sample, correct?

17 A Yes, I did.

18 Q If we can talk about the regulations
19 regarding a Medical Review Officer as put forth by
20 the Department of Transportation, one of the
21 regulations is that the Medical Review Officer
22 interviews the subjects in which the positive result
23 was obtained from, correct?

24 A Yes.

1 Q And, as a matter of fact, the Department
2 of Transportation has indicated that that is an
3 important function of the Medical Review Officer,
4 correct?

5 A Yes.

6 Q In this case you never spoke to my client,
7 correct?

8 A Correct.

9 Q Dr. O'Donnell, you saw it, did interview
10 my client, correct?

11 A I did.

12 Q So would it be fair to say that
13 interviewing an individual, you agree with that
14 regulation that interviewing the individual is an
15 important component that should be done by a Medical
16 Review Officer, correct?

17 A Well, I agree that the information that
18 needs to be collected is important. Not everybody
19 does things that way.

20 Q Are you one of those persons that does not
21 do it that way?

22 A Generally, yes. I interview the donor
23 myself.

24 Q Did anything prevent you from interviewing

1 Q And you talked about published articles
2 that you've had.

3 How many of those articles were in the
4 field of pharmacology or toxicology?

5 A Well, most of my articles deal with
6 toxicology.

7 Q It's fair to say that most of your
8 published material is in occupational medicine,
9 correct?

10 A Yes.

11 Q How many articles that you've published
12 pertain to marijuana?

13 A None.

14 Q And you talked about how you were
15 qualified as an expert.

16 Have you ever been qualified as an expert
17 in interpreting marijuana drug screens?

18 A Yes.

19 Q In how many instances?

20 A I've given testimony before in state
21 review boards probably three or four times, and I've
22 done independent medical reviews pertaining to
23 issues of marijuana disability.

24 Q So how many times have you been tendered

1 my client in this case?

2 A It's not the Chicago Police Department's
3 manner of doing things.

4 Q So are you saying the Police Department
5 prevented you from interviewing my client?

6 A I guess in effect you could say that, yes.

7 If I wanted to know something, I would
8 call whoever it is that sent me the information and
9 ask them for it, and then they interview the

10 subject.

11 Q And if we could just get to
12 Dr. O'Donnell's report that you reviewed,
13 Dr. O'Donnell reviewed essentially the same
14 information that you reviewed regarding the drug
15 tests, correct?

16 A I believe so.

17 Q And, additionally, Dr. O'Donnell also
18 interviewed Duane Bennett?

19 A Yes.

20 Q So would it be fair to say that
21 Dr. O'Donnell had more information when he prepared
22 his report than you did?

23 A Yes. He had the information he collected
24 from the interview.

1 as an expert in the field of interpreting marijuana
2 drug test results?

3 A Probably, about ten.

4 Q And with regard to Dr. O'Donnell's report,
5 you don't agree with his opinions that he rendered
6 in his report, correct?

7 A Well, I agree with some of them and not
8 others.

9 Q Do you know Dr. O'Donnell?

10 A No, I don't.

11 Q Did you review his CV?

12 A I don't think I did.

13 Q Are you aware of the publications that he
14 has produced?

15 A Only as he discussed in his testimony.

16 Q Do you have any reason to believe that
17 Dr. O'Donnell is somehow not qualified to give an
18 expert opinion in this area?

19 A I really don't have an opinion.

20 Q Specifically, with Dr. O'Donnell's report,
21 his observations and opinions, the first one is that
22 certainly there's no question that exposure to an
23 environment with secondhand smoke of burned
24 marijuana is absorbed and deposited in the body and

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1 tests for marijuana metabolites are positive.
2 You agree with that conclusion, correct?
3 **A Yes, I do.**
4 Q So that we're clear, you agree that a
5 person that is exposed to secondhand smoke can have
6 a drug test in which it would be depicted in that
7 drug test?
8 **A Well, I would agree that you can measure**
9 **metabolites in their urine. Drug tests generally**
10 **are quantifiable, so I would agree that, yes, it**
11 **would be positive.**
12 Q And specifically with regard to
13 Dr. O'Donnell's opinion, you certainly agree that
14 secondhand smoke could result in detection in a drug
15 test, but it's your opinion that it couldn't result
16 in a detection to the level in which Duane Bennett
17 showed in his drug test?
18 **A Yes.**
19 Q And specifically in your report you
20 specifically say it's possible to absorb THC through
21 environmental exposure but not at the threshold
22 levels that was found in Sergeant Bennett's urine on
23 July 10, 2012?
24 **A Correct.**

1 Q Page 93.
2 **A Table IV?**
3 Q I'm sorry?
4 **A Table IV?**
5 Q Well, I'll point to exactly where I'm
6 looking at.
7 It's the first partial paragraph on the
8 second column of page 93.
9 **A Well, that was by RIA.**
10 Q You have no reason to dispute that
11 finding, correct?
12 **A Well, by RIA, yes. That's a different**
13 **technique than GC/MS.**
14 Q But it showed that an individual
15 environmentally exposed only to marijuana, no
16 intentional ingestion, just environmental exposure,
17 reached 87 milligrams for marijuana, correct?
18 **A Right, after repeated exposure.**
19 Q So your statement where you essentially
20 said that it was impossible to reach the threshold
21 level of 33 in Sergeant Bennett's case when exposed
22 to environmental exposure, that statement is
23 incorrect based upon the document that you relied on
24 for support; is that correct?

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1 Q And you base that opinion upon -- well,
2 specifically, you cited an article that was done
3 based upon the same experiment that Dr. O'Donnell
4 cited to, correct?
5 **A Yes.**
6 Q And my question to you is your statement
7 that it couldn't rise to that level through
8 environmental exposure, that's not supported by the
9 article in which you cited; isn't that correct?
10 **A Well, it depends on the quantity of**
11 **exposure.**
12 Q Is it fair to say that the article in
13 which you cited individuals that were exposed to
14 environmental exposure, they had levels from
15 anywhere from zero to much higher than that,
16 correct?
17 **A Zero to six, I think is what it says.**
18 Q In fact, there was an individual that
19 tested positive strictly through environmental
20 exposure of 89 -- I'm sorry, 87 milligrams; isn't
21 that correct?
22 **A You're probably referring to one of the**
23 **ones after the first day.**
24 **Do you want to point that out?**

1 **A No.**
2 Q The individual that tested positive with
3 87 ng's of marijuana, that individual, according to
4 this report, was exposed to environmental -- was
5 exposed strictly by environmental exposure with
6 marijuana, correct?
7 **A He was exposed for four days in a row.**
8 Q Strictly by environmental exposure,
9 correct?
10 **A Yes.**
11 Q There's no evidence that this individual
12 was a chronic marijuana smoker, correct?
13 **A There was no evidence that he had any**
14 **marijuana on board at the beginning of the study.**
15 **They were all actually marijuana smokers.**
16 Q It's your belief that these individuals
17 were all marijuana smokers?
18 **A There were two naive subjects, and if you**
19 **look on page 249 of the previous article, it gives**
20 **the marijuana smoking history of the other subjects.**
21 Q And if you look at that, the individual
22 who tested positive, and we'll describe him as
23 Subject F, which is how he was described in the
24 experiment, that individual was a non-marijuana

1 user; isn't that correct?
2 **A Right. He was a non-user.**
3 Q So is it your belief that environmental
4 exposure can result in somebody having a drug test
5 in excess of the threshold levels?
6 **A If the exposure is great, it's possible,**
7 yes.
8 Q Certainly, to the level of 33 ng's,
9 correct?
10 **A If the exposure is large enough, it's**
11 **possible.**
12 Q As a matter of fact, on page 94 the
13 conclusion under the paragraph discussion talks
14 about passive ventilation, or environmental
15 exposure, and that it is essentially the same in
16 some cases as -- the results can be the same in some
17 cases as somebody that actively smokes marijuana,
18 correct?
19 **A Well, it gives a very specific description**
20 **of what it takes to get to that level.**
21 Sixteen marijuana cigarettes for an hour
22 each day for six consecutive days is required to
23 reach this level.
24 Q To reach the level of 87?

1 support that environmental exposure alone can
2 certainly reach to levels above 15 ng, correct?
3 **A Yes, under certain extreme conditions**
4 **which are highly unlikely to occur.**
5 Q So when you say the literature states that
6 it couldn't support environmental exposure above 15,
7 that, in fact, wasn't true, was it?
8 **A Well, this literature that we're looking**
9 **at here forms the basis for the cutoff SAMHSA**
10 **adopted, and so it's the general understanding in**
11 **the community of Medical Review Officers that these**
12 **levels that were demonstrated in this experiment**
13 **actually support the cutoff levels, and that these**
14 **do not represent the kind of exposure that is ever**
15 **likely to occur.**
16 So that's the basis for my statement that
17 in the real world sidestream smoke is hardly ever,
18 in fact, never a result of a positive urine drug
19 screen, similar to if someone were to come with a
20 story like this, which I never heard anyone
21 describe, then it's theoretically possible.
22 **MR. HERBERT:** Ms. Hearing Officer, can I
23 have my question read back, please?
24 **HEARING OFFICER WALKER:** The last one?

1 **A It doesn't say 87. It says to be similar**
2 **to active smoking of one or two marijuana**
3 **cigarettes.**
4 Q And your knowledge of this experiment, or
5 study, it's strictly limited to you reading this
6 document, correct?
7 **A Yes. I have no outside information.**
8 Q And if I could stick with your opinion, I
9 believe it's your second to last sentence in
10 paragraph one, you write, "the medical literature
11 does not support environmental exposure alone as the
12 cause for levels above 15 ng of THC."
13 You wrote that in your report, correct?
14 **A Yes.**
15 Q And, in fact, as we've just discussed the
16 literature, the medical literature does not, in
17 fact, support that?
18 **A Well, this is an experiment which is an**
19 **extreme condition, which the author comments on**
20 **later.**
21 Q But this is medical literature, isn't it,
22 this document?
23 **A Yes, it is.**
24 Q And this medical literature certainly does

1 **MR. HERBERT:** Yes.
2 (Question read.)
3 **BY MR. HERBERT:**
4 Q And I would just ask you to answer that
5 question.
6 **A I think I did.**
7 Q So just so we're clear, your contention is
8 that the medical literature does not support
9 environmental exposure for an individual in excess
10 of 15 ng?
11 **A Well, I think that I should have said**
12 **there in this case, because my opinions are relevant**
13 **to this case.**
14 Q But it's fair to say you didn't say that
15 in anywhere in the report? In this case, you talk
16 specifically about how environmental exposure could
17 not reach above a certain level, and that is the
18 threshold level?
19 Isn't it fair to say that that's what was
20 put in your report?
21 **A Yes, but I recorded the file is misplaced.**
22 Q So was that an error on your part?
23 **A Well, apparently it wasn't treated like it**
24 **could be.**

1 Q And, finally, with regard to drug tests,
2 we had an individual from Quest testify in this
3 case, Ms. Dawn Han, and she indicated there was a
4 margin of error with all of these tests.

5 Would you agree with her regarding that?

6 A I don't know her, but I am assuming that
7 she's a certifying scientist, and if she says that,
8 I'm sure it's true.

9 Q Do you know if there's a margin of error
10 for these tests?

11 A There's margin of error for every
12 measurement.

13 Q What would you say is the margin of error
14 for drug tests, do you know?

15 A No. It would depend on the equipment and
16 the test and the environment.

17 Q How about as far as the margin of error
18 for a marijuana test?

19 A I don't know what its margin of error is.

20 Q And you indicated with regard to the
21 negative hair sample test result that my client
22 provided, you indicated that you reviewed that
23 report prior to making your report?

24 A Yes.

1 never got Dr. Conibear's report before; is that
2 correct?

3 MR. POLK: That's not an exhibit. Now it
4 is.

5 MR. HERBERT: Okay.

6 THE WITNESS: Yes.

7 BY MR. HERBERT:

8 Q And on direct you talked about how you had
9 reviewed the positive drug test that was conducted
10 by the Department, as well as the negative urine
11 test that was done by the Quest Lab. And you also
12 indicated that you reviewed the negative hair test
13 result.

14 My question is based upon that, did you
15 indicate in your report that -- you're looking at
16 the May 16th report. Did you indicate that you had
17 reviewed the negative hair test result?

18 A Yes. On page one in the second paragraph,
19 third line, the hair substance abuse panel tested by
20 Quest Diagnostics.

21 Q And if I could see that document again.
22 Thank you.

23 And then you go on. You have four points
24 that you responded, Dr. O'Donnell's opinions based

1 Q And I believe you said -- strike that.
2 Where in your report does it talk about
3 your review of Duane Bennett's hair sample test
4 results?

5 A I actually issued two reports. I assume
6 you're talking about the second one?

7 Q Yes, May 16, 2013?

8 A Right.

9 Q Do you have that in front of you, or no?

10 A No.

11 MR. HERBERT: I'll mark it for
12 identification purposes as -- I'm sorry. I'm not
13 sure what number I left off on.

14 HEARING OFFICER WALKER: You are at number
15 five.

16 MR. HERBERT: So I'll mark this as
17 Respondent Exhibit No. 6.

18 HEARING OFFICER WALKER: Okay.
19 (WHEREUPON, Respondent's Exhibit
20 No. 6 was marked for
21 identification.)

22 BY MR. HERBERT:

23 Q Do you recognize this report?

24 HEARING OFFICER WALKER: And so I guess we

1 upon the four points that you list in your opinion
2 report, correct?

3 A Correct.

4 Q And do you cite to the negative hair test
5 result in any of those four points? And if you're
6 not sure, I can hand you the document.

7 Do you know, as you sit here today, if you
8 cite to that?

9 A I prefer to look.

10 Q Do you know, as you sit here today, do you
11 know whether or not you did?

12 A I'm not sure.

13 Q And I'm not here to question your memory,
14 but if you could look at that and tell me if that
15 was mentioned in any of those four reports, or those
16 four points of the report.

17 A No, I did not.

18 Q Why did you not mention that anywhere in
19 your analysis of Dr. O'Donnell's opinion?

20 A Because I was answering the four opinions
21 on the second page of this report.

22 Q Well, is it fair to say that

23 Dr. O'Donnell's report indicates that one of the
24 bases for his conclusion that it was a false

1 positive based upon environmental exposure is
2 because of the fact that Duane Bennett had a
3 negative hair sample taken subsequent to the drug
4 test? You would agree with me on that, correct?

5 **A Well, what I do remember is his testimony**
6 **in which he said that it indicated that there was**
7 **not regular use.**

8 Q And Dr. O'Donnell used that negative
9 result as a basis for his opinion that it was
10 environmental exposure, correct?

11 **A I don't know.**

12 Q As we sit here today, do you find any
13 value whatsoever in the fact that there was a
14 negative hair test result, whether or not it would
15 result in this environmental exposure result?

16 Do you understand that question?

17 **A No.**

18 Q I will ask another one.

19 **A There's two parts to it.**

20 Q Sure. In your four points that you put in
21 your report, you address all the reasons in which
22 you believe Dr. O'Donnell's opinion is inaccurate
23 with respect to environmental exposure being the
24 cause, correct?

1 **A The length of the sample is taken such**
2 **that it includes the previous three months.**
3 Q And certainly that would be a longer
4 sample size than a urine test would test for,
5 correct?

6 **A Yes.**

7 Q And in this case Duane Bennett had a hair
8 test done certainly within that three month window,
9 correct?

10 **A I don't understand that question.**

11 Q You're aware of the fact that the positive
12 drug test by the City was taken on July 10th, I
13 believe?

14 **A Right.**

15 Q And the hair test was taken on
16 August 12th, correct?

17 **A I think 21st.**

18 Q Okay. Either way that's certainly within
19 a three month window in which you testified to,
20 correct?

21 **A You mean it would include the time period**
22 **of the CPD test? Is that what you're asking?**

23 Q Yes.

24 **A Yes.**

1 **A No. I was answering the four points, four**
2 **observations and opinions in his letter.**

3 Q And we've already established that you do
4 not address the issue of the negative hair test
5 result that was relied upon in part by
6 Dr. O'Donnell, correct?

7 **A No, because it's not addressed in these**
8 **four points.**

9 Q The four points that you prepared in the
10 report, correct?

11 **A Dr. O'Donnell's report of March 11, 2013.**

12 Q Looking at that same report, it indicates
13 on the first page that he reviewed the negative test
14 result for the hair test, though, correct?

15 **A Yes.**

16 Q What value do you place on the fact that
17 there was a negative hair test done with respect to
18 Duane Bennett in this case?

19 **A It doesn't really have any bearing on the**
20 **urine drug screen done by the CPD.**

21 Q You talked about how on direct that a drug
22 test for hair, normally the marijuana results would
23 be with the hair for approximately three months,
24 correct?

1 Q So would it be fair to say that that
2 information is certainly relevant to some extent to
3 whether or not it was environmental exposure that
4 was the result of the positive drug test on
5 July 10th?

6 **A Well, I would agree with Dr. O'Donnell in**
7 **that it doesn't show persistent use.**

8 Q Would you agree that it is also more
9 supportive of the conclusion that it was
10 environmental exposure versus intentional use?

11 **A No.**

12 Q But you would agree that it would
13 determine that -- or it would be more likely that
14 this person was not exposed to heavy amounts of
15 marijuana, correct?

16 **A I think prolonged is the more important**
17 **factor with hair.**

18 **I don't know exactly what you mean by**
19 **"heavy," I guess.**

20 Q So it would be fair to say that prior to
21 this three month window, I guess is what I'm trying
22 to get at, it would be fair to say that prior to
23 this three month window in which hair test results
24 test for, that time period, prior to the three month

1 window, would be more likely from somebody that was
2 not a heavy user of marijuana?

3 **A I don't understand that at all.**

4 Q Well, what did you mean, then, when you
5 said you agree with Dr. O'Donnell's opinion
6 regarding the hair test result?

7 **A Well, it's my recollection that he said
8 that it was not indicative of a repeated use of
9 marijuana.**

10 Q And you said you agree with that?

11 **A Yes.**

12 Q So what does that mean to you?

13 **A Well, I suppose you could say repeated
14 exposure -- well, it means to me that at some point
15 at which repeated exposure results in a positive in
16 a hair, but a couple of times during the hair sample
17 testing period is apparently not enough to cause a
18 positive. Nobody knows exactly where that cut point
19 is.**

20 Q And just finally wrapping up here, with
21 respect to Dr. O'Donnell's report, he gives the four
22 separate paragraphs explaining his observations and
23 opinions.

24 And then at the conclusion of that, he

1 **A Well --**

2 Q And I'm just asking about the report that
3 you prepared.

4 **A I think in my original report to the CPD,
5 I think it is mentioned, but I know it's not
6 mentioned in this one that you just entered into.**

7 Q If I could show you what I'm marking as
8 Respondent's Exhibit 8.

9 **HEARING OFFICER WALKER:** Respondent
10 Exhibit 6.

11 **MR. HERBERT:** No. 7, I'm sorry, it should
12 be.

13 (WHEREUPON, Respondent's Exhibit
14 No. 7 was marked for
15 identification.)

16 **HEARING OFFICER WALKER:** What was your
17 No. 6?

18 **MR. HERBERT:** I'm sorry. No. 6 was
19 Dr. Conibear's report.

20 **HEARING OFFICER WALKER:** Her report,
21 right. I didn't get a copy of that.

22 **MR. HERBERT:** And it's a July 19th date.

23 **MR. POLK:** Yes.

24

1 provides a concluding paragraph, correct?

2 **A Yes.**

3 Q And then he says considering the above,
4 which is the four points that we talked about, as
5 well as he then describes the additional factors
6 that support his opinion, correct?

7 **A He says that the negative urine supports
8 his opinion and that the evidence does not
9 conclusively support marijuana consumption.**

10 Q And the negative test result at the Adult
11 Primary Care Center, what's your -- that includes
12 the hair sample, correct?

13 **A Oh. I did not take it that way. I don't
14 know. It's not clear. It doesn't say "negative
15 test."**

16 Q Fair enough. Dr. O'Donnell talked about
17 on his direct examination that that was one of the
18 factors that supported his conclusion that it was
19 more likely environmental, as opposed to intentional
20 use. Are you aware of that?

21 **A I did not remember that.**

22 Q But you did not opine on that in your
23 report, the fact that there was a negative hair test
24 result in any way; isn't that correct?

1 **BY MR. HERBERT:**

2 Q If I could show you that, that's a report
3 that you prepared for the City on July 19th,
4 correct?

5 **A Yes.**

6 Q And is that the other report in which you
7 were referring to?

8 **A Yes.**

9 Q And in there does it talk in any way about
10 the negative hair sample test result?

11 **A No, it doesn't.**

12 Q Because, in fact, that report was prepared
13 prior to him even taking a hair sample, correct?

14 **A Could I see it again?**

15 Q Sure.

16 **A Yes, it was.**

17 **MR. HERBERT:** I do not have anything
18 further.

19 **HEARING OFFICER WALKER:** Redirect?
20 **REDIRECT EXAMINATION**

21 **BY MR. POLK:**

22 Q On cross-examination you were asked about
23 over the counter medicine, correct?

24 **A Yes.**

1 Q And you said that over the counter
2 medicine could not cause a positive GC/MS test, but
3 it could, I believe you said, confuse the screeners,
4 correct?

5 A For some drugs.

6 Q So in your opinion can an over the counter
7 prescription cause a positive confirmation test for
8 marijuana?

9 A No.

10 Q You were also asked a few questions about
11 the testing standards, correct?

12 A Yes.

13 Q You were asked about the DOT governing
14 body versus the Illinois Department of HHS. You
15 also talked about some tests being detection limit
16 drug tests, and you talked about how the Cone
17 studies formed the bases for the regulations,
18 correct?

19 A Correct.

20 Q Now, you have other clients besides the
21 Chicago Police Department, correct?

22 A Yes.

23 Q Now, how does the Chicago Police
24 Department's testing thresholds for a positive test

1 more information than you because he interviewed
2 Sergeant Bennett, correct?

3 A Yes.

4 Q In the materials you reviewed in preparing
5 your initial opinion for the Police Department, did
6 you review an interview of Sergeant Bennett?

7 A Yes.

8 Q And did you receive a list of medications?

9 A Yes.

10 Q You were asked a series of questions about
11 Superintendent's Exhibit No. 7, the second Cone
12 article, correct?

13 A Yes.

14 Q And, specifically, you were directed
15 toward page 93 that mentions the 87 nanograms per
16 milliliter for Subject F on the fourth day of
17 marijuana smoke exposure; is that correct?

18 A Yes.

19 Q Are the same results found on Table V,
20 which is on page 95 of that article?

21 Correct me if I'm wrong, my understanding
22 is that page 93 talks to a peak of 87 nanograms per
23 milliliter for Subject F. And then the chart on
24 page 95 has 87 in the column under 16 marijuana

1 compare to your other clients?

2 A Virtually all my other clients use the

3 same testing cutoffs.

4 Q Do any of them use a higher threshold?

5 A No.

6 Q Did any of them use a lower threshold?

7 A None of my clients use a lower threshold.

8 Q So everyone uses 15 nanograms for a

9 confirmation test and 15 nanograms for a screening

10 test?

11 A Yes.

12 Q You were also asked questions about how

13 the Department of Transportation regulations say

14 that it's important for MRO's to interview the

15 donor, correct?

16 A Yes.

17 Q Is the Chicago Police Department a

18 Department of Transportation client of yours?

19 A No.

20 Q Does the Chicago Police Department have to

21 follow the Department of Transportation regulations

22 regarding interviewing donors?

23 A No.

24 Q Also, you were asked if Dr. O'Donnell had

1 cigarettes GC/MS for Subject F, correct?

2 A Oh, yes, I see that.

3 Q So it's essentially summarizing the same
4 data, the peak levels achieved at each subject; is
5 that correct?

6 A Right. These figures are each person's
7 total test results. And then the Table V is the
8 summary of the maximum concentrations.

9 Q And you explained that the 87 is only
10 achieved after repeated exposure, correct?

11 A Correct.

12 Q Why is that significant?

13 A Well, because in this case the donor only
14 had one such exposure.

15 Q And how is repeated exposure relevant
16 towards drug confirmation test results?

17 A It results in accumulation. It's noted by
18 the author here on page 95, second column, about
19 halfway down in the first paragraph.

20 I'm quoting. "It should be noted that the
21 increased concentrations observed following the
22 second day of active smoke exposure for all subjects
23 is more likely a result of the higher room-air
24 exposure levels of THC rather than accumulation.

1 Evidence for accumulation in other subjects was more
2 tentative." So there's an accumulation factor
3 depending on the concentration.

4 Q And you just said the --

5 A And I quoted the wrong sentence.

6 Going to (11), it says, "The terminal
7 phase half-life for THC in plasma for humans ranges
8 from 25 to 36 hours, hence accumulation would be
9 expected to have occurred over the course of the six
10 consecutive days of passive smoke exposure."

11 Q And you said that the SAMHSA guidelines,
12 which are the same as the Department of
13 Transportation guidelines, were established because
14 of these studies, correct?

15 A In part because of these studies, yes.

16 Q And they chose the cutoff as 15 nanograms
17 per milliliter, correct?

18 A Yes.

19 Q Now, looking at Table V on page 95, what
20 was the highest level of GC/MS -- what was the
21 highest level of marijuana metabolite that GC/MS
22 detected in the four marijuana cigarette condition?

23 A Twelve.

24 Q And then the levels were much higher for

1 A Well, in the MRO manuals, which are part
2 of the review course, in the review course it talks
3 about the foundation for these cutoffs, and the Cone
4 studies are prominently featured in those
5 discussions.

6 I don't have any individual knowledge
7 about what SAMHSA did.

8 Q You testified on cross-examination that
9 sidestream smoke could never cause a positive drug
10 test, correct?

11 A I don't think I said that.

12 Q The level that counsel was asking about,
13 the 87 nanograms per milliliter, was from the 16
14 marijuana cigarette condition, correct?

15 A Correct.

16 Q How did that experimental condition affect
17 the participants?

18 MR. HERBERT: Objection.

19 HEARING OFFICER WALKER: Basis?

20 MR. HERBERT: Foundation, vague nature of
21 the question, as well.

22 MR. POLK: It's in the article.

23 HEARING OFFICER WALKER: Well, frankly, it
24 seems to me that you are going quite in depth with

1 the 16 marijuana cigarette condition, correct?

2 A Yes. The highest there was 87.

3 Q Why did the SAMHSA guidelines base the
4 cutoff essentially on the 4 marijuana cigarette
5 condition instead of the 16 marijuana cigarette
6 condition?

7 MR. HERBERT: Objection, foundation, for
8 her to give this opinion. I believe they're asking
9 her why SAMHSA did something.

10 Unless she's part of that SAMHSA decision,
11 I don't know how she can provide that explanation.

12 HEARING OFFICER WALKER: Response?

13 MR. POLK: I'll rephrase.

14 BY MR. POLK:

15 Q You said that in part the SAMHSA
16 guidelines were based on these articles, correct?

17 A Yes.

18 Q And so they were using the data from these
19 articles, correct?

20 MR. HERBERT: Objection, same objection.

21 HEARING OFFICER WALKER: Sustained.

22 BY MR. POLK:

23 Q How are you aware of the information that
24 SAMHSA used in making its guidelines?

1 this study that was not done by the witness, so I'll
2 sustain the objection.

3 BY MR. POLK:

4 Q You were also asked questions about the
5 error margins in drug testing, correct?

6 A Yes.

7 Q And you said you did not personally know
8 the margin of error on these tests?

9 A Correct.

10 Q And you said Dawn Han would be the person
11 to ask, the Quest certifying scientist?

12 A Yes.

13 Q Would you be surprised if she testified
14 that it was 20 percent plus or minus for these
15 tests?

16 A Well, I'm assuming that she's talking
17 about the range of variability, and, no, I wouldn't
18 be surprised.

19 Q Is Sergeant Bennett's test result within
20 20 percent of not having a positive confirmation
21 test level?

22 A No.

23 Q What is the percentage difference in this
24 case?

1 A Well, his, double the cutoff.
2 Q So it would require 100 percent error?
3 A It would be about 55 percent.
4 Q If his genuine level was below 15, and he
5 tested at 33, that would be more than 100 percent
6 error, correct?
7 A That's true.
8 Q You were also asked several questions
9 about whether or not your opinion referred to the
10 hair test, correct?
11 A Yes.
12 Q But you did testify, and your opinion does
13 say that that's one of the things that you referred
14 to, correct?
15 A Yes.
16 Q Similarly, Dr. O'Donnell listed the hair
17 test as one of the things he referred to, correct?
18 A Yes.
19 Q Do you see anywhere in Superintendent's
20 Exhibit No. 4, Dr. O'Donnell's opinion, anywhere
21 other than reviewing the materials that he reviewed
22 on page one, do you see him refer to the hair test
23 anywhere else in his opinion?
24 A No.

1 about that?
2 A I do.
3 Q And you distinguished that from this case
4 based upon the number of exposures with Duane
5 Bennett versus the person in the Cone study,
6 correct?
7 A Among other things, yes.
8 Q And, as a matter of fact, you stated that
9 donor had only one such exposure when you were
10 talking about Duane Bennett; isn't that correct?
11 A Yes.
12 Q Is it your belief that Duane Bennett was
13 exposed to marijuana one time one time only prior to
14 him providing this positive drug test?
15 A Well, I assume you're asking about the
16 other exposures that were in the interview, and I'm
17 aware of those.
18 Q And so when you said that the donor had
19 only one exposure, that, in fact, isn't correct?
20 A Well, he only had one exposure that I feel
21 is relevant to the urine drug screen.
22 Q So you felt that the other three exposures
23 were not relevant, correct?
24 A For various reasons, yes.

1 Q Also, you were asked about how hair tests
2 could show results for the last three months,
3 correct?
4 A Yes.
5 Q You were asked questions about heavy use,
6 and you weren't sure what that meant?
7 A Yes.
8 Q But you said persistent use could result
9 in a positive a drug test?
10 A Yes.
11 Q In your opinion could someone smoke
12 marijuana once deliberately and have a negative hair
13 test result?
14 A Yes.
15 MR. POLK: Nothing further.
16 HEARING OFFICER WALKER: Further cross?
17 MR. HERBERT: Briefly.
18 RECROSS-EXAMINATION
19 BY MR. HERBERT:
20 Q On redirect you were asked some more
21 questions about the Cone report and specifically
22 with respect to the individual that tested positive
23 with 87 ng's for THC in his urine.
24 Do you remember being asked questions

1 Q And you discounted those in your opinion,
2 correct?
3 A Yes, I did.
4 Q One of the exposures in which you
5 discounted was Duane Bennett being at a concert in
6 which marijuana was smoked, correct?
7 A Correct.
8 Q And is it your belief that it would have
9 been impossible for Duane Bennett to have inhaled
10 secondhand smoke in that situation?
11 A I think it's not possible that he would
12 have inhaled enough smoke in that circumstance to
13 have developed a positive urine drug screen.
14 Q And what's your basis of belief for that?
15 A Basically, the Cone article, which shows
16 that exposure that's much more intense than that
17 does not result in GC/MS levels that are above the
18 15 nanogram cutoff.
19 Q When you say "more intense than that,"
20 what is your understanding of Duane Bennett's
21 exposure at this concert that you discounted?
22 A That he sat in the audience and smelled
23 marijuana.
24 Q As you sit here today, do you know

1 anything more about his exposure to that than what
2 you've just stated?

3 **A Well, the exposure of marijuana at a
4 concert is an excuse that I'm frequently offered.**

5 Q My question is as you sit here today, do
6 you have any information about that concert other
7 than what you've just testified to?

8 **A Well, I have the information that was in
9 the interview, and also what I read in
10 Dr. O'Donnell's testimony.**

11 Q You would agree that somebody could be
12 exposed to marijuana, environmentally exposed to
13 marijuana at a concert, would you not?

14 **A Yes, I would agree that there can be
15 marijuana smoke in the area of a concert.**

16 Q That's not my question.

17 My question is that somebody can be
18 exposed to marijuana that's in the air at a concert,
19 correct?

20 **A Yes, if they're there.**

21 Q And we've already concluded that exposure
22 to secondhand smoke from marijuana can be detected
23 in a drug test; isn't that correct?

24 **A If it's at certain concentrations, yes.**

1 Q And despite this fact that -- strike that.

2 You've already agreed that Duane Bennett
3 admitted and stated he was exposed to marijuana use
4 on an occasion at a concert, correct?

5 **A Yes, June 27th, as I recall.**

6 Q And you did not factor that into your
7 opinion that it could not have been environmental
8 exposure in Duane Bennett's case; isn't that
9 correct?

10 **A No, that's not true.**

11 Q Isn't that what you just said, that you
12 discounted that?

13 You indicated that the donor only had one
14 such exposure, and you consider that exposure the
15 one in his house? Did you say that earlier?

16 **A Yes.**

17 Q With regard to that Cone study, are you
18 familiar with what the level of THC was in the
19 marijuana cigarettes that were being used in this
20 experiment?

21 **A He discusses it in one of the papers. I
22 don't remember what it was.**

23 Q Well, would you state that that's a
24 relevant factor, the level of THC in determining

1 Q So somebody that was exposed to marijuana
2 at a concert, as well as other exposures, all those
3 exposures taken together could have the accumulative
4 effect to raise the level on a drug test, correct?

5 **A Well, it depends on how far apart they
6 are.**

7 Q My question is that each exposure can
8 result in a higher level for a drug test, correct?

9 **A The exposures have to be frequent enough
10 to come within the half life when the accumulations
11 occurred.**

12 Q Okay. Assuming all that happens, it's
13 fair to say that each exposure can raise the level
14 of a drug test, correct?

15 **A Well, not in this case.**

16 Q I'm asking you just if you can answer my
17 question.

18 It's fair to say that assuming everything
19 that you stated, that it happened within the certain
20 time period, is it fair to say that multiple
21 exposures to marijuana through environmental
22 exposure can raise the level of a subsequent drug
23 test, correct?

24 **A Yes.**

1 whether or not there's a positive drug test
2 subsequent to that exposure?

3 **THE WITNESS:** Can I hear that question?
4 **MR. HERBERT:** I'll ask another question.

5 **BY MR. HERBERT:**

6 Q You would agree that the level of THC
7 being used in this experiment would be a factor in
8 the results of a drug test done, correct?

9 **THE WITNESS:** Can I hear it again?
10 **MR. HERBERT:** I'll ask another question.

11 **BY MR. HERBERT:**

12 Q The drug test results test for the level
13 of THC in the urine, correct?

14 **A Correct.**

15 Q So, certainly, the level of THC in the
16 marijuana that an individual was exposed to
17 certainly plays a factor in the THC level that's
18 tested for in the urine, correct?

19 **A Well, I think in the Cone study it's the
20 level --**

21 Q I'm just asking a general here. I'm not
22 asking about the Cone study at this point.

23 **A Are you talking about someone inhaling
24 now, or are you asking about sidestream smoke?**

1 Q I'm asking about the THC in marijuana
2 smoke, the amount of that THC certainly is relevant
3 to the levels that can be produced in a drug test;
4 is that correct?

5 A Well, the level taken in is relevant to
6 the level that would be produced in the drug screen.
7 I think that's what you're asking.

8 Q Okay. So the higher the level of THC that
9 somebody is exposed to, it stands to reason that the
10 higher level would be in the drug test results?

11 A Yes.

12 Q And as you sit here today, you're not sure
13 exactly what the THC level was in the marijuana
14 cigarettes that were used in the Cone study; is that
15 correct, without looking at your documents?

16 A I would have to look them up. I don't
17 know them as I sit here without looking.

18 Q You can look on the first page, page 89,
19 under the paragraph Experimental, and it talks about
20 the cigarettes used in the test contain 2.8 THC.

21 Do you see that?

22 A In the second column?

23 Q Yes, under the heading Experimental.

24 A Yes, I see that.

1 that --

2 HEARING OFFICER WALKER: All right. I'll
3 overrule the objection now and let's see which way
4 you're going with this.

5 BY MR. POLK:

6 Q Do you remember the question, Doctor?

7 THE WITNESS: Can I hear it again?

8 (Question read.)

9 THE WITNESS: That's what I understand,
10 yes.

11 BY MR. HERBERT:

12 Q Are you familiar with a study done out of
13 the University of Mississippi, Potency Monitoring
14 Project, in which the researcher, Mohammed Elsohly,
15 E-l-s-o-h-l-y, determined that --

16 MR. POLK: Objection again.

17 MR. HERBERT: If I could finish the
18 question, please.

19 BY MR. HERBERT:

20 Q -- determined that the THC level has risen
21 to approximately 15 to 16 percent? Are you familiar
22 with that study?

23 HEARING OFFICER WALKER: One moment,
24 Doctor.

1 Q And this study was conducted, I believe it
2 was 1987; isn't that correct?

3 A Right.

4 Q You would agree, would you not, that the
5 level of THC in marijuana has increased
6 substantially since 1987, would you not?

7 MR. POLK: Objection.

8 HEARING OFFICER WALKER: Basis?

9 MR. POLK: Foundation. And there's
10 nothing in testimony or evidence that talks about
11 the historical trends of THC concentration in
12 marijuana.

13 HEARING OFFICER WALKER: Well, we are on
14 the second cross, and you're limited to what was
15 questioned in direct.

16 MR. HERBERT: Right, and the Cone study
17 was probably 90 percent of the questions.

18 HEARING OFFICER WALKER: That's true, but
19 that last question wasn't dealing with the Cone
20 study. It was a question in general of a historical
21 nature between 1987 and today.

22 MR. HERBERT: Right, but I think it's a
23 relevant question because I'm going to compare it
24 back to the Cone study. I think it's a factor

1 Your objection?

2 MR. POLK: First, this is far beyond the
3 scope of redirect examination, and, second of all,
4 counsel is offering testimony.

5 MR. HERBERT: I'm not saying this is
6 valid. I'm asking her if she's familiar with the
7 study.

8 HEARING OFFICER WALKER: Let me take the
9 first part of the objection first.

10 Beyond the scope of redirect, would you
11 address that?

12 MR. HERBERT: Sure. The Doctor has talked
13 about how the Cone study, specifically how it was in
14 contrast or somehow didn't support the conclusion by
15 Dr. O'Donnell. That has been the major portion of
16 her opinion, that Dr. O'Donnell's opinions are
17 incorrect.

18 On redirect there was substantial
19 questions asked about Dr. Conibear relating to the
20 high level of THC found in the example in which the
21 individual had the 87 ng's, and the Doctor opined
22 and distinguished that case from this case saying
23 that my client only had one exposure in which she
24 considered.

1 So my question is relating to not only the
2 fact that he certainly had more exposures but also
3 that the exposures that my client was exposed to
4 were not the same conditions that Dr. Conibear is
5 using for her opinions. So I'm certainly within the
6 scope.

7 **HEARING OFFICER WALKER:** But I don't see
8 that being in the scope of redirect.

9 **MR. HERBERT:** It is because of the fact
10 that she just talked about the Cone report and how
11 that report specifically to the positive results of
12 environmental exposure is different from Duane
13 Bennett's claims that it was passive inhalation.

14 The fact that the THC level was different
15 is certainly an area in which I can cross this
16 expert on if that is the basis for her opinion that
17 there is a distinction between the situation
18 discovered in the Cone report, as opposed to what
19 Dr. O'Donnell has already testified to as occurring
20 with Duane Bennett.

21 **HEARING OFFICER WALKER:** But the witness
22 did answer positively when you asked about the
23 increase in the amount of THC from 1987 to the
24 present. She did answer that question, so the

1 about the concert he described?

2 **A** Yes.

3 **Q** What factors led you to not count the
4 concert as an exposure that would contribute to a
5 positive marijuana test result?

6 **A** Because the Cone study is highly
7 dependent, as he notes in here, on the fact that it
8 was a small room and there was no ventilation, so
9 that the smoke was held into the room through the
10 entire hour, even though there was no smoking going
11 on.

12 He also noted that just opening the door
13 to that room decreased the concentration of
14 marijuana in there by 90 percent.

15 And a concert is generally in a large open
16 space, so even if multiple people were smoking,
17 there's ventilation in there, and it's highly
18 unlikely that levels that were described in there
19 would be achieved.

20 During the time the 16 cigarettes were
21 smoked, the room was visibly smoky, and it was so
22 irritating that people had to wear goggles. It
23 would be highly unlikely that scenario would be
24 produced at a concert.

1 objection is sustained.

2 **BY MR. HERBERT:**

3 **Q** Are you aware of the fact that the THC
4 level in marijuana today is that of 15 to
5 16 percent?

6 **A** I know that it's more. I don't know what
7 the percentage is.

8 **Q** When you say "more," you mean more than
9 when the Cone study was conducted, correct?

10 **A** Yes.

11 **MR. HERBERT:** Nothing further.

12 **HEARING OFFICER WALKER:** Any further
13 direct?

14 **MR. POLK:** Yes.

15 FURTHER REDIRECT EXAMINATION

16 **BY MR. POLK:**

17 **Q** You were asked on recross about why you
18 discounted three of the four scenarios that Sergeant
19 Bennett described in his interview, correct?

20 **A** Correct.

21 **Q** You said you only counted the incident in
22 his son's room; is that correct?

23 **A** Yes.

24 **Q** And you were asked specifically questions

1 **MR. HERBERT:** I would object to the
2 narrative answer, first of all, and I would also
3 object to this answer as there's no foundation for
4 her to provide this opinion.

5 She can provide an opinion based upon the
6 knowledge that she has acquired in this case, but
7 she's already testified that she doesn't know
8 anything about this concert other than what she read
9 in the report. So I think her giving an opinion on
10 this concert, other than extremely general opinion
11 about generally concerts in nature, anything beyond
12 that is inappropriate.

13 **HEARING OFFICER WALKER:** The objection
14 would be to the question, wouldn't it, not to her
15 answer?

16 **MR. HERBERT:** Not necessarily, because she
17 can provide a limited answer, but anything beyond
18 her basis of knowledge needs to be stricken.

19 **HEARING OFFICER WALKER:** Can I hear the
20 question and the witness' answer so far.

21 (Record read as requested.)

22 **HEARING OFFICER WALKER:** As to your
23 objection as the response being outside of the
24 witness' professional knowledge, that is overruled.

1 Your objection as to the narrative nature of the
2 question is sustained.

3 So, Counsel, you need to ask another
4 question, all right, so we can break up that answer.

5 **MR. POLK:** Yes.

6 **BY MR. POLK:**

7 Q You said one of the key factors was
8 essentially the volume of air that the marijuana
9 smoke is occupying, correct?

10 A Yes.

11 Q How would your opinion of the level of
12 marijuana exposure be affected if you learned that
13 the concert was an outdoor concert?

14 **MR. HERBERT:** Again, I would object.

15 She's here to give an opinion on the drug
16 test of Duane Bennett. I don't think her being
17 asked general questions about some unknown concert
18 has any relevance to the purpose of the testimony
19 today.

20 **HEARING OFFICER WALKER:** Overruled. You
21 did bring up the concert in cross.

22 **THE WITNESS:** Well, that would re-enforce
23 my opinion.

24

1 **HEARING OFFICER WALKER:** One second.
2 (Question read.)

3 **HEARING OFFICER WALKER:** So, Mr. Herbert,
4 you're saying that the basis of the conditions in
5 the question is somehow improper? Are you talking
6 about the 13 days?

7 **MR. HERBERT:** I'm talking about her to be
8 able to give an opinion based upon this --

9 **HEARING OFFICER WALKER:** The 13 days?
10 **MR. HERBERT:** Right, without further
11 information, and just the other factor is she didn't
12 rely on this information in coming up with her
13 opinion, so it's completely irrelevant.

14 **HEARING OFFICER WALKER:** Your response.
15 Mr. Polk?

16 **MR. POLK:** It's entirely relevant because
17 on recross-examination he was essentially trying to
18 show that these events were close enough together
19 for there to be some accumulation which would
20 somehow have an impact on the urine test from the
21 Police Department's urine test.

22 It's a very simple question about the half
23 life of marijuana, given the scientifically known
24 half life of marijuana, how would this amount of

1 **BY MR. POLK:**

2 Q You also were asked about the time span of
3 the subsequent exposures, and you mentioned that it
4 would have to be something along the lines it would
5 have to be within the half life, and counsel said
6 assuming all of that, then would it have an
7 accumulation effect, or something to that effect.

8 What is the half life of marijuana
9 metabolites in the human body?

10 A 27 to 36 days is usually cited as a half,
11 life, so every 36 -- I'm sorry, hours. Excuse me.
12 27 to 36 hours.

13 So in each 36-hour period, the amount
14 that's being excreted is halved.

15 Q So if the concert was 13 days prior to the
16 Chicago Police Department's urine test, how would
17 that affect the level of marijuana in his urine?

18 **MR. HERBERT:** Objection, speculative.

19 There's way too many variables for her to
20 give an answer to that question.

21 **HEARING OFFICER WALKER:** Let me hear the
22 question, please.

23 **MR. POLK:** My response is it's only one
24 factor.

1 time affect the concentration of marijuana in urine,
2 marijuana metabolites in urine.

3 It's essentially a mathematical equation,
4 how many full decrease was the marijuana in this
5 amount of time. It's a straightforward question
6 that shows that there would be no accumulation that
7 would be detectable.

8 **HEARING OFFICER WALKER:** Well, the 13 days
9 are facts that are before the witness.

10 The information that was given to her was
11 a concert was attended on June 27th?

12 **MR. HERBERT:** Yes.

13 **HEARING OFFICER WALKER:** And the testing
14 was done on July 10th, which would be the 13 days,
15 so your objection is overruled.

16 Do you need the question re-read?

17 **THE WITNESS:** Yes.

18 (Question read.)

19 **THE WITNESS:** Well, I was just doing some
20 calculations while you guys were talking, and that
21 would be about 8 half lives. That would be 24 times
22 13 would be the total number of hours, and I divided
23 36 into that, and I got about 8 half lives.

24 And just for illustration, the highest

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1 level was 87 in the paper, and I just rounded it up
2 to 90. And then it goes to 45, to 22, to 11, to 5
3 down to 2, and that's the fifth half life, so it
4 would be virtually zero. There would be nothing
5 left 13 days later from that equation, even given
6 such a high level, which I'm doubtful that he had.

7 **BY MR. POLK:**

8 Q So just to make sure I understand your
9 answer, if he had 90 nanograms per milliliter due to
10 secondhand exposure the day of the concert, it would
11 be undetectable the day that he had the Chicago
12 Police Department urine test?

13 A Yes.

14 Q And that is the limit of detectability for
15 the GC/MS?

16 A Well, I didn't even go down further. I
17 can't tell you exactly what it is, but it would have
18 been a negative test, that's for sure.

19 Q And you were also asked if you were aware
20 that marijuana is currently approximately 15 to 16
21 percent THC concentration by weight; is that
22 correct?

23 A Yes.

24 Q Approximately, how much of an increase is

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1 that from the Cone study?

2 Assuming that that fact is true, which is
3 not in evidence, if marijuana were currently 15 to
4 16 percent, how many fold increase is that from what
5 was used in the Cone study?

6 A It would be equivalent to about one less
7 marijuana cigarette.

8 Q So would the increased concentration in
9 marijuana that's currently available today account
10 for being in a room the size of a bathroom with 16
11 marijuana cigarettes being smoked?

12 MR. HERBERT: Objection, form of the
13 question.

14 HEARING OFFICER WALKER: I didn't
15 understand it myself, so rephrase that, please.

16 MR. POLK: Yes.

17 BY MR. POLK:

18 Q The Cone study took place in a small,
19 unventilated room, correct?

20 A Yes.

21 Q And the dimensions were 2.1 meters by 2.5
22 meters by 2.4 meters, correct? That's on page 90 of
23 the second Cone study?

24 A Yes.

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1 Q And in the conclusion of the Cone study --

2 MR. HERBERT: And I'm just going to object
3 to the leading questions.

4 HEARING OFFICER WALKER: I didn't hear the
5 question yet.

6 MR. HERBERT: But he's about to read what
7 the Cone study says. I don't think it's an
8 appropriate question.

9 HEARING OFFICER WALKER: Let me hear the
10 whole question.

11 BY MR. POLK:

12 Q How big is that room, if it's those
13 dimensions provided?

14 Page 95 to 96 of the second Cone study,
15 the last sentence of page 95 might assist you.

16 A It would be compared to a bathroom.

17 Q So my question is does the increased
18 concentration of THC in marijuana that's currently
19 available that we don't have specific numbers for,
20 does that account for being exposed to 16 marijuana
21 cigarettes being burned in an unventilated room the
22 size of a bathroom?

23 MR. HERBERT: Objection.

24 HEARING OFFICER WALKER: Sustained. It's

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1 way off point.

2 BY MR. POLK:

3 Q Is an increase from 2.8 percent to 15 to
4 16 percent, is that a 16-fold increase?

5 A No.

6 MR. POLK: Nothing further.

7 HEARING OFFICER WALKER: Any further
8 questions?

9 FURTHER RECROSS-EXAMINATION

10 BY MR. HERBERT:

11 Q Just with regard to the 16-fold increase,
12 from 2.8 percent to 15 percent, that would be
13 approximately a 500 percent increase, would it not?

14 A I guess I misunderstood. I thought you
15 said a 15 percent increase.

16 Q I didn't ask the question.

17 2.8 percent versus 15 percent, that would
18 be an over 500 degree increase; isn't that correct?

19 A Yes. I misunderstood you. I thought you
20 said it was a 15 percent increase.

21 So you're saying that the percent by
22 weight is now 15 percent?

23 Q Yes.

24 A Well, that's about a 5-fold increase.

1 Q I'm sorry. I didn't hear what you said.

2 A About a 5-fold increase. It's about six
3 times.

4 Q So that's a 600 percent increase?

5 A Yes.

6 Q And all your opinions are based upon the
7 Cone report, which examines THC use of 2.8 percent
8 THC, correct?

9 A Well, not solely on the Cone report.

10 There are other papers and the literature, as well.

11 Q You haven't cited to any other papers or
12 literature other than the Cone report; isn't that
13 correct?

14 A I didn't cite any others, but that doesn't
15 mean my opinion isn't based on my entire knowledge
16 and training as an MRO.

17 Q Did you list any other reports in your
18 opinion other than this Cone report?

19 A No, I did not specifically cite any
20 others.

21 Q And I'm not sure you gave me an answer to
22 your question, but the Cone report talked about THC
23 use of 2.8 percent, or THC levels of 2.8 percent,
24 correct?

1 But that half life calculation is
2 irrelevant to the exposure situation. It's merely a
3 way of determining what after a certain amount is
4 taken in how long it takes for that to leave the
5 body. It has nothing to do with the Cone study.

6 Q And just finally on that point, you talked
7 about how based upon your calculation of your
8 scenario with the half life at the concert that it
9 would be undetectable in a drug test based upon this
10 13 day scenario. Is that what your testimony was?

11 A Well, I can't answer that question because
12 I don't know what the GC/MS level is, but it would
13 be virtually gone in biological terms.

14 Q Based upon there being an 87 ng reading --
15 assuming that there was an 87 ng reading at the time
16 in which the person was at the concert, correct?

17 A And anything less than that.

18 Q Anything less than that?

19 A Yes.

20 Q Anything more than that and your scenario
21 would not apply, correct?

22 A No, just do the calculations.

23 Q Right, but the answers that you gave
24 regarding the half life, that's contingent on the

1 A Yes.

2 Q So all your opinions today are based upon
3 the assumption that the marijuana was at 2.8 percent
4 of THC, correct?

5 A No. My opinions, as I stated, are based
6 on the Cone study and the other studies of
7 sidestream smoke that have been performed.

8 Q But all your answers today that relate to
9 the Cone study, all of those answers are premised
10 upon the fact that there was a 2.8 THC level,
11 correct?

12 A Yes, and the Cone study would be exposure.

13 Q So that half life experiment that you
14 broke down for Mr. Polk, that was based upon a 2.8
15 THC level that you came up with, correct?

16 A No. That has nothing to do with the half
17 life.

18 Q But when you talked about somebody having
19 a -- your example was that the individual had a 90
20 milligram reading. That was based upon a THC level
21 of 2.8; isn't that correct?

22 A No. I just took that because I needed a
23 number to show you what happened, and that was 87
24 was the highest number in the Cone study.

1 fact that it's no higher than 87 ng, correct?

2 A It's just an example.

3 Q I'm aware of that.

4 A Okay.

5 Q And, also, it's also contingent upon the
6 fact that somebody has not been exposed to marijuana
7 at all in any other situations during that 13-day
8 period, correct?

9 A It's based on no accumulation, no starting
10 point.

11 Q So no exposure to any to marijuana in any
12 other situations, correct?

13 A Well, actually, it's all based on what the
14 level was at the time of the exposure.

15 If it's added to a previous one, then the
16 beginning level might be higher than one would
17 expect based on the exposure, but the calculation is
18 always the same. Wherever you start from, the body
19 eliminates half of that in 27 to 36 hours.

20 Q Right. I'm aware of that. But my
21 question is when you did your scenario for the 13
22 days in which somebody was exposed to marijuana and
23 then 13 days later was given a drug test, in your
24 scenario if that individual was exposed to marijuana

1 on subsequent occasions during the interim period of
2 the concert to the drug test, that certainly would
3 affect the levels in a drug test, correct?
4 **A** Yes. Exposures after that would increase
5 the levels and prolong the time.

6 **MR. HERBERT:** Nothing further.

7 **HEARING OFFICER WALKER:** Mr. Polk?

8 FURTHER REDIRECT EXAMINATION

9 **BY MR. POLK:**

10 Q So the marijuana used in the Cone study
11 was 2.5 percent THC by weight, correct?

12 **A** 2.8.

13 Q But in the condition that achieved the
14 highest results, there were 16 cigarettes being
15 smoked simultaneously in the room the size of a
16 bathroom, correct?

17 **MR. HERBERT:** Objection, asked and
18 answered.

19 **HEARING OFFICER WALKER:** Yes, it has been
20 asked and answered.

21 **THE WITNESS:** Actually, eight and eight.

22 **HEARING OFFICER WALKER:** So get right to
23 your question which has to be based on the last
24 questions asked.

1 calculation, correct?

2 **A** Yes.

3 Q And you said it was approximately eight
4 half lives?

5 **A** Yes.

6 Q Are you saying that each time that half
7 life passes the amount of marijuana metabolite in
8 the urine is decreased by 50 percent, it's halved
9 each time?

10 **A** It's halved.

11 Q So one-half times to the eighth power
12 would be how much marijuana was left because eight
13 half lives were passed?

14 **A** I'm not sure.

15 **MR. HERBERT:** I would just object.

16 **HEARING OFFICER WALKER:** I think we're
17 getting into some mathematical computations here,
18 and since that's not my forte, no.

19 **MR. POLK:** I will not ask that question
20 again. I rest.

21 **HEARING OFFICER WALKER:** Doctor, I would
22 like for you to address your attention to the test
23 of the hair follicle that was done on the
24 Respondent, and specifically my question is how long

1 **MR. POLK:** He said that it was a 500-fold
2 increase, and I was trying to point out that it is
3 certainly less than a 16-fold increase.

4 So when you're being exposed within one
5 time span to 16 marijuana cigarettes being smoked,
6 that is such a huge increase that the increase in
7 concentration of marijuana is negligible compared to
8 the massive dose.

9 The total THC is what matters, and getting
10 exposed simultaneously to 16 not very potent by
11 current standards marijuana cigarettes is much
12 less -- is much greater than being exposed to any
13 marijuana that is currently available.

14 The potency of marijuana --

15 **MR. HERBERT:** I object to this, and I'd
16 ask that all of it be stricken.

17 **HEARING OFFICER WALKER:** The objection is
18 sustained, and save your arguments for closing
19 arguments.

20 **MR. POLK:** I was trying to explain why the
21 16-fold was important. I apologize.

22 **HEARING OFFICER WALKER:** All right.

23 **BY MR. POLK:**

24 Q And you were asked about your half life

1 would the marijuana stay in someone's body in order
2 for the test of one's hair to be effective?

3 **THE WITNESS:** The way it gets deposited in
4 the hair is it has to be in your blood, and the
5 blood circulates and your body is making hair, and
6 it gets put in there. And once it's put in there,
7 it never comes back out into the blood.

8 So as the pulses of the drug get deposited
9 in the hair, and it grows out, that's what you're
10 measuring. So what's in the hair is like a natural
11 history of what's been in your blood and the higher
12 level and the more that gets deposited.

13 But it seems that single exposures aren't
14 enough to achieve a high enough average, because
15 when they test it, it's like an average over time of
16 what was in your blood. So you can have individual
17 exposures, but they don't achieve the level of the
18 cutoff for hair.

19 Did I answer your question?

20 **HEARING OFFICER WALKER:** So are you
21 saying, then, the intensity of the marijuana coming
22 into someone's body has to be higher in order for it
23 to appear in that person's hair?

24 **THE WITNESS:** If you had one single really

1 high level, that would probably be not enough to
2 cause your hair over the three months to test
3 positive, as where if you had like ten moderate
4 levels, that would be more likely to give you a hair
5 test that's positive. So it's a marker of frequent
6 use.

7 **HEARING OFFICER WALKER:** Frequent use.
8 Okay.

9 So, Mr. Polk, any questions for the Doctor
10 based on what I've asked her?

11 **MR. POLK:** No.

12 **HEARING OFFICER WALKER:** Mr. Herbert?
13 FURTHER CROSS-EXAMINATION

14 **BY MR. HERBERT:**

15 Q Just so I'm clear, your opinion is that
16 multiple moderate uses are less likely to show up in
17 a hair sample, as opposed to a single high level
18 use?

19 **A The opposite.**

20 Q So somebody using a single high level dose
21 is less likely to show up in a hair sample, as
22 opposed to somebody that uses multiple moderate
23 doses?

24 **A Yes.**

1 Q So a negative hair test result, based upon
2 your opinion, it would lead to the opinion that the
3 individual that had a negative hair test did not use
4 it multiply and moderately?

5 **A Yes.**

6 **MR. HERBERT:** Nothing further.

7 **MR. POLK:** Nothing based on that.

8 **HEARING OFFICER WALKER:** Thank you,
9 Doctor. You may be excused.

10 Let's go off the record.

11 (Discussion off the record.)

12 **HEARING OFFICER WALKER:** So, first of all,
13 let's go back on the record.

14 Does the Department rest as to rebuttal?

15 **MR. POLK:** Yes, we rest with rebuttal.

16 **HEARING OFFICER WALKER:** And let's go
17 through your documents, and let me know which, if
18 any exhibits, you wish to attempt to move into
19 evidence.

20 **MR. POLK:** I would move to have
21 Superintendent Exhibits 3, 4, 7 and 8 admitted to
22 evidence.

23 **HEARING OFFICER WALKER:** Let's take them
24 separately. Exhibit 3, any objection?

1 **MR. POLK:** That's the first Cone article.
2 **MR. HERBERT:** No objection.
3 **HEARING OFFICER WALKER:** It shall be
4 admitted.

5 I'm sorry, Mr. Polk, what was the next
6 one?

7 **MR. POLK:** Four, Dr. O'Donnell's opinion.
8 **MR. HERBERT:** No objection.

9 **HEARING OFFICER WALKER:** It shall be
10 admitted.

11 **MR. POLK:** Seven, the second Cone article.
12 **MR. HERBERT:** No objection.

13 **HEARING OFFICER WALKER:** It shall be
14 admitted.

15 **MR. POLK:** Eight, the volatile oil
16 composition.

17 **MR. HERBERT:** No objection.
18 **HEARING OFFICER WALKER:** It shall be
19 admitted.

20 Respondent?

21 **MR. HERBERT:** Respondent 1.

22 **HEARING OFFICER WALKER:** Respondent 1 is
23 the book you just referenced?

24 **MR. HERBERT:** Exactly. I'm not going to

1 move to admit that.

2 **HEARING OFFICER WALKER:** Respondent 2,
3 Respondent's Complimentary and Disciplinary History.

4 **MR. HERBERT:** Yes.

5 **HEARING OFFICER WALKER:** Did you want to
6 move it into evidence or have the Police Board look
7 at it after they make the decision?

8 **MR. HERBERT:** I want to move it into
9 evidence.

10 **HEARING OFFICER WALKER:** Mr. Polk, if you
11 can make sure that there's an up-to-date copy of
12 that, and that should be marked Respondent's No. 2,
13 and you can just check with Max on that, please.

14 **MR. POLK:** Okay.

15 (WHEREUPON, Respondent's No. 2
16 was marked for identification.)

17 **HEARING OFFICER WALKER:** Your Exhibit
18 No. 3 is the negative urine test result.

19 **MR. HERBERT:** That there was no
20 stipulation, so I would seek introduction of that,
21 Respondent 3.

22 **MR. POLK:** We would object based on the
23 reasons we previously discussed, the lack of chain
24 of custody and thresholds, otherwise documentation

1 for the test.

2 **MR. HERBERT:** All I would respond is that
3 I would ask that the Board could assign it an
4 appropriate weight, if it so chose, because the
5 chain hasn't been stippled to or hasn't been met, I
6 think they can certainly give it less weight, if it
7 so chooses, but I think it's a document that could
8 go back to the Board.

9 **HEARING OFFICER WALKER:** Well, it could
10 only go to the Board if it's in evidence.

11 **MR. HERBERT:** Correct.

12 **HEARING OFFICER WALKER:** And so I have to
13 rule on the objection to it's being admitted.

14 **MR. HERBERT:** Right.

15 **HEARING OFFICER WALKER:** Are you saying,
16 Mr. Polk, that this was addressed in the prehearing?

17 **MR. POLK:** It was addressed in our first
18 or second day of hearing, and we objected, and you
19 sustained our objection. And then you encouraged us
20 to reach a stipulation, and we attempted to reach a
21 stipulation, but he could not get the affidavit that
22 we requested of a chain of custody and collection,
23 so there's no evidence of the collection of the
24 sample, the condition of the sample, or the chain of

1 used in the second urine test.

2 So, I'm sorry, could you tell me what your
3 objections are to that specifically, Mr. Polk?

4 **MR. POLK:** It's the same objection that we
5 made previously. There's no information about how
6 the collection was taken, if it was observed, that
7 the sample was unadulterated, what the thresholds
8 were for what counts as a positive or negative test,
9 the chain of custody.

10 And we tried to work out a stipulation
11 just to get an affidavit about the collection and
12 chain of custody, and not even more specific
13 paperwork than that, but just a sworn notarized
14 affidavit, and we did not receive that.

15 **HEARING OFFICER WALKER:** Anything further,
16 Mr. Herbert?

17 **MR. HERBERT:** No. I'll rest on my
18 previous arguments.

19 **HEARING OFFICER WALKER:** All right. So
20 the objections are sustained.

21 I'm just looking at that document now, and
22 it does not have the requirements that are needed.
23 So Respondent's No. 3 is not admitted.

24 Number 4 is the hair sample test. My

1 custody for the test.

2 **HEARING OFFICER WALKER:** I'm looking,
3 however, at our prehearing document that was
4 submitted by the Respondent, and I do see the second
5 urine test being one of the exhibits that the
6 Respondent was going to use.

7 Had we not resolved any foundation issues
8 at the time of the prehearing?

9 **MR. POLK:** I don't have the note of the
10 prehearing conference, but as far as I know, it was
11 identified at the prehearing conference but not
12 admitted into evidence.

13 **MR. HERBERT:** Right.

14 **HEARING OFFICER WALKER:** Right. We
15 weren't admitting any exhibits at the prehearing.

16 **MR. HERBERT:** You encouraged us to work
17 out a stipulation.

18 **HEARING OFFICER WALKER:** Is that what it
19 is. And you have been unable to do that?

20 **MR. POLK:** We were for the hair test. We
21 were not for the urine test.

22 **HEARING OFFICER WALKER:** Yes, you're going
23 to work it out, a stipulation as to the authenticity
24 in terms of the chain of custody and the procedures

1 notations here says that it is part of the joint.

2 **MR. HERBERT:** Yes.

3 **HEARING OFFICER WALKER:** So that is part
4 of the stipulation, correct?

5 **MR. HERBERT:** Yes.

6 **HEARING OFFICER WALKER:** Exhibit No. 5,
7 Respondent's Exhibit No. 5, is Dr. Conibear's
8 report.

9 **MR. HERBERT:** That was already admitted.

10 **HEARING OFFICER WALKER:** It wasn't
11 admitted.

12 **MR. HERBERT:** I'm sorry. Then I wanted
13 that admitted.

14 **HEARING OFFICER WALKER:** Any objection?

15 **MR. POLK:** No objection.

16 **MR. HERBERT:** Did that one have the CV on
17 there?

18 **HEARING OFFICER WALKER:** The CV was
19 separate, and the Department did move the admission
20 of Dr. Conibear's CV.

21 **MR. POLK:** That's Superintendent's 7.

22 **MR. HERBERT:** Okay. I'm sorry. I
23 apologize.

24 I do not seek the admission of

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1 Dr. Conibear's report.

2 **HEARING OFFICER WALKER:** Okay.

3 Dr. Conibear has two reports.

4 **MR. HERBERT:** Either one.

5 **HEARING OFFICER WALKER:** Either?

6 **MR. HERBERT:** Either one.

7 **HEARING OFFICER WALKER:** And then Exhibit

8 No. 7 is Dr. O'Donnell's CV.

9 **MR. HERBERT:** Yes, I would ask that that
10 be admitted.

11 **MR. POLK:** No objection.

12 **HEARING OFFICER WALKER:** That shall be
13 admitted.

14 So we also had some off the record
15 discussion as to a continued date solely for closing
16 arguments, and that will be July 15, 2013, at 12:00
17 o'clock noon. I'll see you then.

18 That's all for today. Thank you.

19 (WHICH WERE ALL THE PROCEEDINGS
20 HAD IN THE ABOVE-ENTITLED CAUSE
21 ON THIS DATE AND TIME.)

22

23

24

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1 STATE OF ILLINOIS)
2 COUNTY OF COOK } ss.

3

4 DANIEL M. PRISCU hereby certifies that he
5 reported in shorthand the proceedings in the
6 above-entitled matter and that the foregoing is a
7 true and correct transcript of said proceedings.

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13 Certified Shorthand Reporter
C.S.R. Certificate No. 084-003982

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